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sender of a telegram. The case went upon a demurrer to the petition which alleged both mental sufferings and pecuniary injury, and the court held that the plaintiff was entitled to "nominal damages at least."

BENJAMIN F. REX.

St. Louis.

(To be continued.)

RECENT AMERICAN DECISIONS.

Circuit Court Southern District of New York.

RINTOUL v. NEW YORK CENT. & H. R. RAILROAD CO.

A clause in a bill of lading which provides that the carrier, who is legally liable for any damage, shall have the benefit of any insurance that may have been effected upon the damaged goods, is not an unreasonable and unjust exemption from liability for negligence, and may be enforced.

When it is shown that goods were injured while being transported over a railroad operated by defendants, and that the accident was one which, in the ordinary course of things, would not have happened if those who had the management had used ordinary care, the presumption, in the absence of explanation by the defendants, is that the accident arose from the latter's negligence.

THIS was an action against a common carrier for the loss of goods destroyed while in course of transportation, in consequence of a fire caused by a collision between two trains of a railroad over which the goods were being transported. The goods had been shipped under a bill of lading issued by the Merchants' Dispatch Transportation Company, an association engaged in the business of contracting for the carriage of goods between various points, and in procuring such carriage by the railroad companies. The following were the material conditions of the bill of lading :

"That the said Merchants' Dispatch Transportation Company, and its connections which receives said property, shall not be liable * * * for loss or damage by wet, dirt, fire, * * * nor for loss or damage of any article or property whatever, by fire or other casualty, while in transit, * * * nor for loss or damage by fire, collision, or the dangers of navigation, while on seas, rivers, lakes or canals. * * *

"It is further stipulated and agreed, that, in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal

liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods. * * *

“Notice. In accepting this bill of lading the shipper, or the agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed.”

The cause was tried, by agreement, without a jury, upon an agreed statement of facts, the material parts of which have been given above.

George W. Wingate, for plaintiffs.

Frank Loomis, for defendants.

SHIPMAN, J. (after stating the facts).

I. The fundamental principle which is applicable to the foregoing facts, is stated in the conclusions of the Supreme Court in *Railroad Co. v. Lockwood*, 17 Wall. 357, as follows:

“First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. Second. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.”

The exemption in the bill of lading from the liability of the land carrier for fire or other casualty, does not include exemption from liability for a casualty which was caused by the negligence or want of care of the carrier in whose custody the property was at the time of the happening of the damage.

II. The presumption from the facts which are contained in the agreed statement is, that the fire and injury were caused by the negligence of the defendant. And this presumption was not rebutted “when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care; it affords reasonable evidence in the absence of explanation by the defendants, that the accident

arose from want of care:" *Scott v. Dock Co.*, 3 Hurlst. & Colt. 596; *Transportation Co. v. Downes*, 21 Am. Law Reg., N. S. 522; *Rose v. Stephens & Condit Trans. Co.*, 11 Fed. Rep. 438. The defendant was therefore liable to the plaintiff for the damage occasioned by such negligence.

III. The remaining question is, whether the clause in the bill of lading, which provides that the carrier who is legally liable for any damage shall have the benefit of any insurance that may have been effected upon the damaged goods, shall be so construed as to give the benefit of the insurance to a carrier whose negligence caused the injury, or whether such a contract so construed is not an unjust and unreasonable exemption from liability for negligence.

The argument of the plaintiffs is to the effect that such a contract virtually protects the carrier from liability arising from his negligence, because the owner of property in transit is compelled, as a prudent business man, to insure against the accidental injuries for which the carrier is not liable, and, therefore, if the contract is valid, the carrier has indirectly, and covertly, but securely, protected himself against the injurious consequences of his want of care by an insurance for which he did not pay, and on account of which there is no evidence of a reduction of the rates for freight.

It does not seem to me that such a contract is unreasonable, because, 1st. It is not one of exemption from liability. The owner is under no obligation to insure; he is not compelled to furnish indemnity to the carrier; and if he insures, can make a limited contract of insurance which does not cover losses through the carrier's negligence. There is, therefore, no contract of exemption against liability for loss by negligence, no agreement that the carrier shall be protected or be indemnified, but the contract simply is that in the contingency of insurance, a consequent benefit will, in case of loss, result to the carrier.

2d. It is not unfair to the owner. The carrier is at liberty to insure his interest in the property intrusted to his care, and the fact that he may obtain an indemnity from a third person, by means of the owner's policy, is not unfair to the owner, unless the obtaining such indemnity is in reality made compulsory upon him, because the owner "can equitably receive but one satisfaction" for the loss of his goods: *Hart v. Railroad Co.*, 13 Met. 99. If it

was a part of the bill of lading that the owner must insure for the benefit of the carrier, such conditions would be unfair.

3d. The contract is not necessarily unfair to the insurer. At common law, the owner who has been paid in full or in part, for his loss, by the insurance company, may sue the carrier upon the contract of bailment, and as to so much of the amount recovered from the carrier as is in excess of a full satisfaction of the loss, the owner will be a trustee for the insurance company. It seems that the effect of the clause in the bill of lading which is now under consideration, is to provide that the owner, in such circumstances, is not a trustee for the insurance company but a trustee for the carrier. If such a contract is entered into without fraudulent concealment of the facts from the insurers, of which there is no evidence in this case, it cannot properly be considered unjust or unreasonable, because the insurance company obtains its remedy, not by virtue of a contract of its own with a carrier, but through the owner's contract, and its right depends upon or is subject to the agreement made by the owner with the carrier, which he is at liberty to make to suit his own interest, provided there is no fraudulent concealment from the insurers. They can, in view of this provision in bills of lading, modify the contract which they have heretofore customarily made with the insured, and the result will probably be that the insurers will also make provisions in their policies by virtue of which insurance on property in transit will have a limited character.

In the absence of any contract on the subject, if the insured owner accepts payment from the insurers, they "may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss." The right rests upon "the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner." The suit cannot be in the name of the insurers: *Hall & Long v. Railroad Co.*, 13 Wall. 367; *Hart v. Railroad Co.*, 13 Met. 99; *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173; *Conn. Mut. Life Ins. Co. v. Railroad Co.*, 25 Conn. 256.

By the contract in question, the owner agrees, that, as between him and the carrier, the latter, when he has paid for the loss, may have the benefit of the insurance. This contract will probably interfere with the benefit which the insurer would otherwise obtain by virtue of being subrogated to the rights of the owner, or of having

an equitable assignment of the owner's interest in the policy; but the mere fact, in the absence of fraud, that the insurers may not occupy the same position which they would have had if the provision had not been inserted, is not sufficient to justify an opinion that the provision is unreasonable.

The amount of the premium and the amount received by the plaintiffs from the insurance are not given in the agreed statement. I am inclined to the opinion that the owner is only bound to account to the carrier for the net avails of the insurance, and if those avails were less than the value of the goods, a balance would still be due from the defendant. But as the finding simply says that the plaintiffs received from the insurers the full value of the flour, I cannot assume that the net avails were not a full indemnity for the loss.

The defendant is liable for the amount of the loss, deducting the sum which the plaintiffs have already received by way of indemnity, and as the entire amount of the loss has been paid, the plaintiffs are entitled, under the contract, to receive nothing more.

Judgment is to be entered for the defendant.

The vital point involved in the decision of the principal case is, whether an agreement between a carrier and shipper, to the effect that, "It is further stipulated and agreed, that in case of any loss or detriment or damage, done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred * * * the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods," is a valid stipulation in law.

The test of the validity of such a stipulation is analogous to the test of the legality of any special rule or usage or custom in a trade, and that is, its reasonableness or general propriety for the special branch of trade in which it is asserted, and which the ordinary simplicity and common mercantile convenience of that trade demand. In testing, then, the validity or reasonableness of

the above stipulation, it will be convenient to determine what the meaning of the stipulation is, what actual or supposed duties it is intended to relieve the common carrier from performing, what duties the common carrier owes to the shipper at the common law, and how the relations of shipper and carrier in respect to those duties are altered by the above stipulation.

In ascertaining the meaning of the above stipulation, the first question suggested is, what is the meaning of the words "legal liability or responsibility" referred to in the stipulation. Are these words intended to be restricted to the carrier's "liability" for accident alone, or are they intended to include "liability" for loss, caused as well by the carrier's negligence as by accident? According to the decision of *Wyld v. Pickford*, 8 M. & W. 443, the former interpretation could very easily prevail. In *Peek v. Railway Co.*, 10 H. L. C. 498, BLACKBURN, J., in alluding to the

above case, said: "The judgment, however, was that the plea to the count in trover was bad. This was on the ground, that on the weight of authority, a notice in the terms stated in the plea, viz.: that the carriers would not be responsible for loss or damage done to goods unless insured, did not make the carrier irresponsible for every loss, but only for such as occurred without negligence, whether gross or ordinary, and the inadvertent mis-delivery admitted in the plea, might be even grossly negligent though inadvertent." That learned judge, however, questioned the soundness of this construction, and remarked, further on, "that the judgment in *Wylde v. Pickford* seems to me to proceed on the ground that the authorities bound the court to put a construction on the terms of the notice, that the carrier 'would not be responsible for loss or damage,' making them mean, would not be responsible for loss or damage unless caused by negligence. This certainly seems to me not the natural meaning of the words, or the sense in which they would be understood either by a carrier or his customer; and though the weight of authority might, at the time when *Wylde v. Pickford* was decided, compel one of the courts below to put this forced meaning on the words, I think your lordships would hardly even then have considered yourselves bound to do so." In *Hinton v. Dibbin*, 2 Q. B. 646, however, later on, the question was again raised whether these words were to be understood as containing an implied exception of gross negligence, and the decision of the court was, that the words were to be understood in their natural sense, as exempting the carrier from liability from negligence as well as accident; and "this decision has always been acquiesced in;" per BLACKBURN, J., in *Peck v. Railway Co.*, *supra*. This stipulation, then, under discussion, we may assume, is to be construed as an agreement for the transfer to the

carrier of the benefit of the shipper's insurance, whether the liability or responsibility of the former arise from negligence or accident.

Having thus determined the meaning of the "liability" or "responsibility" referred to in the above agreement, we may consider the general intent of the above stipulation.

What do terms of the above stipulation imply? The agreement stipulating that the carrier shall have the benefit of the shipper's insurance in all cases where the former is liable or responsible for loss, is an agreement compelling the shipper, where he sues or has recovered damages from the carrier for the loss of a cargo, to hand back to the carrier so much of the damages as his insurance amounts to. Thus, in every case, where the shipper has insured, the carrier, by this set off, is relieved from the responsibility for his negligence, at least so far as the damages he has inflicted are covered by the amount of insurance.

We omit discussing a very important effect of this stipulation upon the shipper, in respect to his relation to the insurer as to the latter's right of subrogation; for it has been decided in *Carstairs v. N. & T. Ins. Co. of New York*, 18 Fed. Rep. 473, in the Circuit Court of Maryland, that the insurer, having lost his right of subrogation against the carrier, in consequence of this stipulation, will be relieved from paying the amount of the insurance. Now it may be that where the insurer has due notice of, and insures, subject to this stipulation between shipper and carrier, he will be liable to pay the insurance; but in all probability, having lost his right of subrogation, he will be compelled to charge the shipper increased rates of premium. But this we leave out of the discussion.

But a comprehensive view of the effect of this stipulation must lead to

the conclusion that by means of this set off of the shipper's insurance, the carrier virtually intends to contract, in every case, for exemption from responsibility for negligence or accident. Now SHIPMAN, J., stated, in the principal case, that the above stipulation was reasonable, because it was not one of exemption from liability, saying: "The owner is under no obligation to insure; he is not compelled to furnish indemnity to the carrier, and if he insures, can make a limited contract of insurance which does not cover losses through the carrier's negligence; there is, therefore, no contract of exemption against liability for loss by negligence, no agreement that the carrier may be protected or indemnified, but the contract simply is, in the contingency of insurance, a consequent benefit will, in case of loss, result to the carrier. * * * If it was a part of the bill of lading that the owner must insure for the benefit of the carrier, such condition would be unfair."

It is idle, however, to contend that the stipulation is not a compulsory contract freeing the carrier from his liability for negligence, if not in all cases, at least in a vast number of cases; for, as a fact, every one familiar with the transportation of cargo, is well aware that shippers almost universally do insure, and besides, the above stipulation of the bill of lading would be simply meaningless, if shippers were not in the constant habit of effecting insurance on their cargo. At all events, is *any* agreement between shipper and carrier, exempting the latter from the effects of his negligence, in *any* case, a valid stipulation?

Having now ascertained the meaning of the above contract between the shipper and carrier, and what duty it is intended to free the carrier from performing, it will be necessary, in order to consider the question of its reasonableness, to find out how far the carrier

is, at common law, bound to answer for a breach of this duty to the shipper, or, in other words, to what extent the carrier may make with the shipper a special contract of exemption from negligence.

In every system of law with which we are acquainted, the contract of the carrier involves the obligation of applying reasonable care and diligence in the custody and conveyance of the thing to be carried. No doubt it was always by our law competent to a carrier in respect of articles as to which he did not hold himself out as a common carrier, to insist on a special contract, and by its terms to limit the extent of his liability. But the fact that, in the absence of any special agreement, which, of course, would supersede the law, the obligation to use due care and diligence with the subject-matter of the bailment attached, by operation of law, upon the contract to carry, shows that, in the eye of the law, it is deemed reasonable that this obligation should form part of the duty of the carrier. Per COCKBURN, C. J., in *Peek v. Railway Co.*, 10 H. L. C. 553. And in the same case BLACKBURN, J., says: "He was also bound to receive goods tendered to him for carriage, and was liable for an action if he refused to receive them without reasonable excuse; and such action may still be maintained. * * * But many years ago a practice began by which carriers sought to restrict their liabilities by giving notice that they would not be answerable for loss, except on conditions limiting the extent of their common-law liability as carriers." * * * "Still, however," he added, quoting STORY, J., "it is to be understood that common carriers cannot by any special agreement exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice exempt themselves from all responsibility in cases of

gross negligence or fraud, or by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations of their rights." Now it is to be borne in mind that the position of the carrier is greatly altered by the introduction of railways, and the shipper no longer stands on the same ground of equality with him as formerly. On page 555, of the above case, COCKBURN, C. J., said: "There cannot be a doubt that, practically speaking, the introduction of railways has destroyed the competition which formerly existed, and the effect of which was to secure to the goods-owner fair and reasonable terms from the carrier, between distant termini. Between some, indeed, where there happens to be more than one line of railway, as, for instance, between London and York, and London and Exeter, some competition may be said to exist, but over the greater portion of the country, and even on the lines to which I have just referred, between all the intermediate places, it is idle to talk of competition as practically existing. On the other hand, the absence of other means of conveyance, as well as the increased rapidity of transport, compels the owner of goods, at least for all the purposes of business, to resort to railway conveyance. He is thus at the mercy of the carrier, and has no alternative but to submit to any terms, however unjust and oppressive, which the latter may see fit to impose."

In *Express Co. v. Caldwell*, 21 Wall. 267, STRONG, J., observed: "Common carriers do not deal with their employers on equal terms; there is, in a very important sense, a necessity for their employment. In many cases they are corporations chartered for the promotion of public convenience. They have possession of the railways, canals and means of transportation on the river, they can and do carry at much cheaper rates than those private carriers de-

mand. They have on all important routes supplanted private carriers; in fact, they are without competition except as between themselves, and that they are thus, in most cases a consequence of advantages obtained from the public. It is, therefore, just that they are not allowed to take advantage of their powers, and of the necessities of the public, to exact exemption from that measure of duty which public policy demands." And the same learned judge, in the course of his opinion in the above case, stated, it was now the settled law, "that the responsibility of the common carrier may be limited by express agreement made with his employer at the time of the accepting goods for transportation, provided the limitation be such that the law can recognise as *reasonable* and *not inconsistent with sound public policy*."

Having now seen that, by the common law, the carrier could not exempt himself from the responsibility of his own negligence, and that the carrier is not at a greater disadvantage now than formerly, let us endeavor to ascertain whether the carrier can legally make such a stipulation of exemption as the above, and for this purpose let us examine the law as laid down in the modern cases. Before discussing the cases it must be observed that the fact of the carrier's ability to insure against any loss, though caused by his own negligence, is not pertinent to this question, since he owes no duty to the insurer and pays a consideration, while he always owes a duty to his shipper, and besides pays no consideration when the latter insures. It is thus quite clear that the carrier's ability to insure himself cannot at all affect the question, as to whether he can, in any case, either compel the shipper to insure for him, or get the benefit of the shipper's insurance, and so be relieved of his responsibility for negligence.

It is also to be observed that that line

of cases has no place here, which is to the effect, that the carrier may make certain reasonable contracts with the shipper, not excusing negligence, but limiting the time in which the shipper may bring suit, as, for instance, in *Express Co. v. Caldwell*, 21 Wall. 264, where it was held that a contract limiting the shipper's right to sue in case of loss to ninety days, was valid, as it was a mere statute of limitation. See, also, *Wolf v. West Union Tel. Co.*, 62 Penn. St. 83; *Lewis v. Great West. Railway Co.*, 5 H. & N. 867; *Young v. West. Union Tel. Co.*, 34 N. Y. (S. C.) 390. So in *Simons v. Great West. Railway Co.*, 18 C. D. 805, where two rates of charges were offered the shipper, and the contract was that the company would not be liable in the case of special or reduced rates; or where the agreement is that the freight shall be prepaid, or else no liability. Or where the articles to be transported are of extraordinary value or of dangerous composition, such as a very valuable animal, the expense of loss being greatly disproportioned to the freight allowed; or where the bulk of the article carried is in immense disproportion to its value, as a package of diamonds, gold, &c.

The cases on the point under discussion were ably and exhaustively reviewed by BRADLEY, J., in *Railroad Co. v. Lockwood*, 17 Wall. 357, the facts of which are stated, *infra*, on page 303, and we shall state his conclusions therefrom. On page 367, he said: "A review of the cases by the courts of New York, shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by these precedents, we could, perhaps, find no authority for reversing the judgment in this case. But on a question

of general law, the federal courts administering justice in New York, have equal and co-ordinate jurisdiction with the courts of that state. And in deciding a case which involves a question on which the courts of New York have expressed such diverse views, and have so recently, and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves and resting upon what we consider sound principles of law. In passing, however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Judge DAVIS, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations: and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the powers to make these kinds of contracts:" *Stinson v. N. Y. Cent. Railroad Co.*, 32 N. Y. 337. * * * In Pennsylvania, it is settled by a long course of decisions, that a common carrier cannot, by notice of a special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents: *Laing v. Colder*, 8 Penn. St. 479. See *P. & A. Railroad Co. v. Baldouf*, 8 Penn. St. 67; *Goldey v. P. Railroad Co.*, 30 Id. 242; *Powell v. P. Railroad Co.*, 32 Id. 414; *P. Railroad Co. v. Henderson*, 51 Id. 315; *Farnham v. C. & A. Railroad Co.*, 55 Id. 53; *Express Co. v. Sands*, Id. 140; *Empire Trans. Co. v. Wamsutta Oil Co.*, 63 Id. 14. "The doctrine is firmly settled," says Chief Justice THOMPSON, in *Farnham v. Camden & Amboy Railroad Co.*, 55 Penn. St. 62, "that a common carrier cannot limit his liability so as to cover his own or his servant's negligence." * * * In

Pennsylvania Railroad Co. v. Henderson, 51 Penn. St. 315, a drover's pass stipulated for an immunity of the company in case of injury from negligence of its servants or otherwise. The court, Judge READ, delivering the opinion, after a careful review of the Pennsylvania decisions, says: "This endorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or the property however it may have been occasioned; and our doctrine, settled by the above decision, made upon great deliberation, declares that such a release is no excuse for negligence."

The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence or that of his servants: *Jones v. Voorhees*, 10 Ohio 145; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Id. 362; *Wilson v. Hamilton*, Id. 722; *Welsh v. P., F. W. & C. Railroad Co.*, 10 Id. 75; *Cleveland Railroad Co. v. Curran*, 19 Id. 1; *C. H. & D. Railroad Co. v. Pontius*, Id. 231; *Knowlton v. Erie Railroad Co.*, Id. 260.

In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility from loss occasioned by natural causes, such as weather, fire, heat, frost, &c., *Fillebrown v. G. T. Railroad Co.*, 55 Me. 462, yet in a case where it was stipulated that a railroad company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owner should take the risk of all such damages, the court held, that the company were not thereby excused from the consequences of their negligence. See *Sager v. Portsmouth*, 21 Me. 228, 238.

To the same purport, it was held in Massachusetts, in the late case of *School District v. Boston, &c., Railroad Co.*, 102 Mass. 552-556, where the defendant set up a special contract that certain

iron castings were taken at the owner's risk of fracture or injury during the course of transportation, loading and unloading, and the courts say: "The special contract here set up is not alleged, and could not by law be permitted, to exempt the defendants from liability from injuries by their own negligence."

To the same purport, likewise, are many other decisions of the state courts. See *Ind. Railroad Co. v. Allen*, 31 Ind. 394; *Mich. South. Railroad Co. v. Heaton*, Id. 397, note; *Flynn v. P., W. & B. Railroad Co.*, Houston 417; *Orndorff v. Adams Ex. Co.*, 3 Bush 194; *Swindler v. Hilliard & Brooks*, 2 Rich. (S. C.) 286; *Berry v. Cooper*, 28 Ga. 543; *Steele v. Townsend*, 37 Ala. 247; *South. Ex. Co. v. Crook*, 44 Id. 468; *Whitesides v. Thurkill*, 12 S. & M. 599; *South. Ex. Co. v. Moon*, 39 Miss. 822; *N. O. M. Insurance Co. v. N., &c., Railroad Co.*, 20 La. Ann. 302.

The Federal law is expressed in *Railroad Co. v. Lockwood*, 17 Wall. 357, in the very able opinion by BRADLEY, J., just adverted to. There, a drover with cattle on a through train, was compelled at Buffalo to sign an agreement to attend to the loading, transporting, and unloading of them, and to take all risks of injury to them and of personal injury to himself, or to whomsoever went with the cattle, and he received "a drover's pass," stating that he had shipped sufficient cattle to Albany to entitle him to a free pass. In an action for injury caused by the company's negligence, it was held, affirming the court below, that a common carrier does not drop his character as such, merely by entering into a contract limiting his responsibility, that the stipulation in the case was illegal, being unjust and unreasonable in the eye of the law, and that the carrier being guilty of negligence, was responsible in damages.

The common law of England was carefully considered in *Peek v. Railway*

Co., 10 H. L. C. 493. And BLACKBURN, J., said the law was correctly stated by STORY, J., in his Law of Bailments, and is substantially the same as the law in America, up to 1832. In 1832, however, the well-known "carriers act" was passed in England, which was construed by the courts, so as to permit the carrier to restrict by special contract, his own liability for negligence, fraud or misconduct, till finally the climax was reached in *Carr v. L. & Y. Railway Co.*, 7 Exch. 707. In this case plaintiff signed a ticket of a company, which was to transport his horse, to the effect that he would undertake "all risks of conveyance whatsoever, and that the company would not be responsible for any injury or damage however caused;" and it was held, though the horse was killed by gross negligence by the defendants servants, that the plaintiff could not recover. In 1854, however, the Railway and Canal Traffic Act of 17 & 18 Vict. c. 31, intervened, as the companies sought "to evade altogether the salutary policy of the common law." The material words of the act ran "every such company * * * shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things * * * occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration * * * given by such company contrary thereto. * * * Provided, always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge, before whom any question relating thereto, is tried to be just and reasonable." And, "the truth is," as BRADLEY, J., remarked in *Railroad Company v. Lockwood*, *supra*, "that this statute did little more than bring back the law to the original position in which it stood before

the English courts took their departure from it."

In *Peek v. Railway Co.*, *supra*, the owner of some marble chimney-pieces, desired to send them to London, and the agent of the railway company stated, as a condition, that the company would not be responsible for damage to the goods sent, unless their value was declared, and insured, the rate of insurance being at ten per cent. on the declared value. The goods were then sent "uninsured." The goods were injured and an action for damages was brought; the cause was first heard before ERLE, J., in 1858, who thought, *inter alia*, that the condition was a reasonable one. On a rule to show cause, subsequently in the Court of Queen's Bench, before Lord CAMPBELL, ERLE, J., and CROMPTON, J., the condition was held to be unreasonable. ERLE, J., dissenting. The decision of the Queen's Bench, was on appeal, reversed in the Exchequer Chamber, by POLLOCK, C. B., MARTIN, WATSON, CHANNELL, BB., and WILLES J.; WILLIAMS, J., was of contrary opinion. The case then went to the House of Lords who ordered to be put to the judges, *inter alia*, the question: "is the condition, that the company should not be responsible for injury to the goods unless the same were declared and insured according to their value, a just and reasonable condition, within the true intent and meaning of the 17 & 18 Vict. c. 31, sec. 7." The judges were divided in opinion. In the negative were, COCKBURN, Chief Justice of the Queen's Bench, BLACKBURN, and CROMPTON JJ. In the affirmative were POLLOCK, C. B., MARTIN B., and WILLES and WILLIAMS, JJ. The condition was held in the House of Lords, to be unjust and unreasonable, by Lords WESTBURY, C., CRANWORTH and WENSLEYDALE, Lord CHELMSFORD dissenting.

This case, although decided on the wording of the statute, is merely a reiter-

ation of the principles of the common law as it existed up to 1832, when the Carriers' Act was passed and is extremely pertinent to the point under discussion.

The other cases which are applicable to this point are the *Phoenix Ins. Co. v. Erie West. Trans. Co.*, Lawson on Carriers 382 (1879), U. S. District Court, decided by DYER, D. J. : *Merch. Mut. Ins. Co. v. Calebs*, 20 New York 173; and *Carstairs v. Merch. & Trade Ins. Co.*, 18 Fed. Reporter 473. These cases virtually approve of the rule laid down in the principal case. In *Merch. Mut. Ins. Co. v. Calebs*, *supra*, however, it is to be noticed that the court in delivering its opinion, especially reverted to the fact that "this benefit was secured to them in consideration, in part, of the *reduced rates of the price* of transportation of the goods, of which the insured had the benefit." And besides no negligence was shown in the case. So that perhaps this case is not altogether in point, and the principal case depends for all authority upon the above federal decisions of the lower courts just adverted to.

It may, perhaps, be not out of place to give as an illustration of the effects that might follow, if this stipulation is valid, the case of a common carrier declining to be responsible for injury to passengers, unless insured against accident, &c., or insisting on the benefit of any insurance passengers might have against accident.

It may be well here to observe the unfortunate consequences as respects the shippers' rights, which must follow if the decision in the principal case is correct. In the first place, the railroad company being restricted to impose a maximum rate for freight, would be permitted in certain instances to compel the shipper to pay the maximum rate as well as the additional sum for insurance for the carrier's benefit. Again, as the stipulation gives the carrier the benefit of the insurance, wherever the carrier is liable he may thus be relieved, not only against

gross negligence, but against the felonious acts of negligence on the part of his servants. Again, finally, as was observed by COCKBURN, C. J., in *Peek v. Railway Co.*, *supra*, "a further reason for preventing railway companies from too easily divesting themselves of responsibility of negligence is to be found in the fact with which everybody's experience unhappily makes us familiar that loss or injury too frequently arises from the negligence of some of the numerous servants whom railway companies are under the necessity of employing. It is only by the utmost vigilance on the part of those to whom the management of railway affairs is committed, that this evil can be kept at its lowest point, and the effect of sanctioning such a condition as the present (one of compulsory insurance or absence of liability) will obviously be either to compel those who have goods to be conveyed to submit to undue exaction, or, in the event of their refusing to pay the required premium, to deprive them of the protection which the interest of the railway companies, in preventing negligence on the part of their servants would otherwise secure them." But in *P. & R. Railroad Co. v. Derby*, 14 How. 486, GRIER, J., said "where carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence * * * any negligence in such cases, may well deserve the epithet of "gross;" and these are in accordance with remarks of DAVIS, J., above."

It is true that it may be contended that it is an invasion of the private rights of individuals, and contrary to sound policy to allow those who have made a foolish contract, to ask to be relieved from the operation of its terms; but when we consider that these conditions are usually imposed suddenly, at the moment of delivery of the goods by the shipper, when mature reflection as to

their import is not possible, when often their terms are not clearly understood, or are printed in some obscure place in the bill of lading, often in type too small to be understood, or at a moment when repudiation of them is annoying and irksome to the customer; when the shipper and carrier no longer stand on the same ground of equality, as, since the introduction of railways, all competition is virtually done away with; it certainly does not appear harsh or improper for a

court to examine the propriety or legality of such stipulations at a subsequent period, and if they shall appear to be unjust and unreasonable, to hold them to be void, and relieve the shipper from the effect of their terms.

Whether the rule decided in the principal case be sound in principle or not, there certainly does appear to be equal if not much greater authority for the assertion of a contrary doctrine.

ARTHUR BIDDLE.

United States Circuit Court, District of New Jersey.

ROUEDE v. MAYOR, ETC., OF JERSEY CITY.

A *bona fide* holder of municipal bonds cannot be prejudiced by the fact that the merely formal requirements of the statute authorizing their issue were not complied with.

Overdue and unpaid coupons attached to municipal bonds are not sufficient to put a purchaser upon inquiry, so as to charge him with notice of defects of title.

IN debt.

Robert O. Babbitt, for plaintiff.

Allan L. McDermott, for defendant.

NIXON, J.—The principle is well settled by the Supreme Court that, in a suit by a *bona fide* holder against a municipal corporation to recover the amount of coupons due or bonds issued under authority conferred by law, no questions of form merely, or irregularity or fraud or misconduct on the part of the agents of the corporation, can be considered. The only matters left open in this case for inquiry are, 1. The authority to issue the bonds by the laws of the state, and 2. The *bona fides* of the holder: *East Lincoln v. Davenport*, 94 U. S. 801; *Pompton v. Cooper Union*, 101 Id. 196; *Copper v. Mayor, etc., of Jersey City*, 15 Vroom 634.

This suit is brought upon twenty bonds of the defendant corporation, of the denomination of \$1000 each, sixteen of which are dated July 1st 1873, and the remaining four October 1st 1873. The recital appears upon the face of the sixteen that they were issued